

A DANGEROUS PRECEDENT INDEED — A RESPONSE TO C R SNYMAN'S NOTE ON *MASIYA**

K PHELPS

Lecturer, Department of Public Law, University of Cape Town

INTRODUCTION

Masiya v Director of Public Prosecutions 2007 (5) SA 30 (CC) (hereafter *Masiya*) is inherently controversial. The facts of the case, the unlawful anal penetration of a 9-year-old girl, strike at the heart of our social fabric. The legal issues at stake, such as the principle of legality, the separation of powers and the Constitution, strike at the heart of our legal order. It is thus unsurprising that the judgment in *Masiya* has elicited critical commentary. This is a direct response to one such comment, C R Snyman's recent note 'Extending the scope of rape — A dangerous precedent' (2007) 124 *SALJ* 677 (hereafter 'Snyman'). Snyman addresses the following four issues in his note as they pertain to the judgment in *Masiya*: the principle of legality; separation of powers; the constitutionality of the common-law definition of rape; and whether the court was unduly swayed by emotional considerations. This comment refutes his stance and the reasoning employed in relation to each of these issues.

Snyman and the present author do agree on one thing, however: that the majority judgment in *Masiya* is unconvincing. To borrow his words, '[t]he decision on the law in this case fills one with a sense of unease' (Snyman at 677). It is our explanation of why that is different. He argues that the court 'overstepped its judicial function and violated the principle of legality when it extended the ambit of rape' (Snyman at 677–8). I argue quite the opposite: that the court did not proceed boldly enough with its judicial function, that is, to bring the law into line with the Constitution of the Republic of South Africa, 1996, and that the principle of legality is no barrier to this.

Findings of the Constitutional Court

In order to place the following discussion in context it is helpful briefly to restate the facts and findings of the Constitutional Court. The applicant, Mr Masiya, was tried and convicted in a magistrate's court on the charge of rape of a 9-year-old girl. Her testimony and the medical evidence indicated that she had been anally penetrated by the accused. The magistrate nonetheless convicted Mr Masiya of rape, which conviction the High Court upheld on the grounds that the common-law definition of rape was unconstitutional. The common-law definition of rape was thus developed along gender-neutral lines. The matter was then referred to the Constitutional Court for confirmation.

* My thanks to Professor Jonathan Burchell for the many discussions he engaged in with me while this comment was being written. The views expressed here remain my own.

The majority, in the judgment of Nkabinde J (in which Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, Yacoob J and Van Heerden AJ concurred), found that the common-law definition of rape was constitutional in so far as it criminalized conduct that was clearly socially unacceptable (*Masiya* para 27). The definition was nonetheless found to fall short of the spirit, purport and objects of the Bill of Rights (s 39(2) the Constitution), therefore requiring adaptation (ibid). The common-law definition of rape was thus developed incrementally to include 'acts of non-consensual penetration of a penis into the anus of a female' (para 74). In his dissenting judgment Langa CJ (with whom Sachs J concurred) held that it was possible to extend the definition of rape to include the anal penetration of men without specifically dealing with the constitutionality of the common-law definition. This is curious, considering that the judgment goes on to consider various rights in the Bill of Rights in advocating for a gender-neutral definition of rape.

This comment is not directly about the case of *Masiya* or the merits of various possible definitions of the crime of rape. Rather, the case provides the context for a broader discussion of the principles of law that have been raised as a result of the judgment. The definition of rape was finally changed a matter of months after the *Masiya* judgment was handed down when the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into force in December 2007. This Act arguably filled the lacunae that existed in the crime of rape by providing a more expansive definition. It has not, however, resolved debates surrounding the legal issues raised by *Masiya*.

THE PRINCIPLE OF LEGALITY

The focus of the majority judgment in *Masiya* regarding the principle of legality is clearly on the prohibition on retrospective application of the law, with little depth of discussion provided on whether the principle permits development of the common-law definitions of crimes at all. It cannot have viewed this aspect of the principle as problematic, however, as it did develop the definition of rape to include the anal penetration of females. This decision, despite failing to substantiate the courts' ability to develop common-law crimes, implicitly acknowledges that such development does not infringe the legality principle.

Snyman on legality

Despite the court's implicit acceptance of its ability to develop the common-law definition of crimes, certain commentators believe that the principle of legality prohibits courts from effecting such development (see for example Shannon Hoorntje 'Recent cases: Specific crimes' (2007) 20 *SACJ* 78 at 81). Snyman provides scathing criticism of the Constitutional Court on this basis (Snyman, and see also C R Snyman *Criminal Law* 5 ed (2008) 46–7 (hereafter *Criminal Law* (2008))). According to his line of reasoning,

developing the definition of rape along gender-neutral lines, or any lines, would fall foul of the principle of legality and the courts' role in the separation of powers: 'The principle of legality should be regarded as barring not only the creation of new crimes by courts, but also as barring the extension by the courts of the definitions of existing ones' (Snyman at 682). Hoctor *op cit* at 86 has put forward a similar argument:

'[I]t should be recognized that there is a crucial difference between the legitimate and vital role of the courts in striking down criminal law rules which are unconstitutional and the act of extending the bounds of existing crimes, which founders on the principle of legality. . . . [I]t remains unacceptable that a court should disregard the principle of legality in usurping the function of the legislature.'

If this is indeed the correct interpretation of the principle of legality, then the Constitutional Court did infringe the principle by affecting an extension of the definition of rape. However, this understanding of legality is unduly rigid and not in keeping with the supremacy of our Constitution.

The core common-law features of the principle of legality are similarly defined by both Professors Burchell and Snyman (see Jonathan Burchell *Principles of Criminal Law* rev 3 ed (2006) 96–104 and C R Snyman *Criminal Law* 4 ed (2002) 39 (hereafter *Criminal Law* (2002)) and *Criminal Law* (2008) 36), viz:

1. Crimes and their punishments must be created by a properly made law explicitly identifying the conduct as a crime.
2. There must be some punishment affixed to the commission of the act;
3. The definition of the common law and statutory crimes should be reasonably precise and settled.
4. Penal statutes should be strictly construed;
5. The law should be accessible;
6. The punishment for offences must be prescribed by law; and
7. Criminal laws must have a prospective operation, to state otherwise, there can be no punishment imposed retrospectively.

It is not immediately apparent from the above list that the principle of legality permits no development of the scope of common-law definitions of crimes, as Snyman would have us believe. In fact, to satisfy (3) it may on occasion be necessary to develop the scope of a crime in order, for example, to make it precise or settle discrepancies in different sources of law:

'The definitions of [common-law] crimes find their authoritative expression in the decisions of the courts and books of authority. Since judges and scholars may differ in their interpretation or understanding of these sources as they relate to the existence of a crime or definition of the elements of a crime, there always exists a measure of uncertainty as to the exact ambit or scope of a common-law crime.' (Burchell *op cit* 100)

The principle of legality has always permitted courts to develop the scope of common-law crimes by recognizing behaviour that had not previously been recognized within the definition (Kelly Phelps & Sha'ista Kazee 'The

Constitutional Court gets anal about rape — Gender neutrality and the principle of legality in *Masiya v DPP* (2007) 20 SACJ 341 at 353–4). To say otherwise would render the law irrelevant to a changing modern society.

An example of case law that substantiates this stance is cases concerning the theft of credit. The common-law definition of the crime of theft has been found to include the theft of credit despite the fact that this type of theft had not previously been recognized within the definition (*Criminal Law* (2008) 45). Thus the Appellate Division stated in *R v Solomon* 1953 (4) SA 518 (A) at 522G–H: ‘It must be borne in mind that, under our modern system of banking and paying by cheque or kindred process, the question of ownership in specific coins no longer arises in cases where resort to that system is made.’ Reference is made to this and other similar decisions in *S v Graham* 1975 (3) SA 569 (A) at 577pr:

‘The foregoing decisions have not escaped academic criticism, but they stand as judgments of this Court. They were referred to in the arguments in the instant case without criticism and I need say no more than that I am unpersuaded that they are manifestly wrong. They are therefore binding.’

It has been suggested (see for example Hoctor op cit at 81) that these decisions can be explained by the fact that they predated the Constitution and, now that the principle of legality is enshrined in the Constitution (ss 1(c) and 35(3)(l), (m) and (n)), courts would no longer be able to tamper with the definitions of crimes. With respect, this cannot be the correct interpretation of these precedents. Such a stance implies either that before the principle of legality became a constitutional principle it was different in nature, or that it was in some way easier or more permissible to disregard its provisions. However, the principle of legality is a cornerstone of the rule-of-law doctrine (Hoctor op cit at 79). ‘As such, it must be accepted that it was a fundamental and binding principle of law before the Constitution and it remains so after the Constitution’ (Phelps & Kazee op cit at 351). Thus, the only way to understand these precedents is that the principle of legality has always permitted development of the scope of common-law crimes by recognizing new forms of behaviour that are consonant with existing definitions. To understand the principle any other way would render the common law stagnant and irrelevant, incapable of accommodating new forms of conduct in modern society.

A similar example to the theft of credit is the crime of defeating or obstructing the course of justice. Although South African courts adopted English terminology with respect to the definition of this crime, it was the Roman-Dutch authorities that informed the substance and boundaries of the offence (Burchell op cit 939–40). Since the notion of a police service did not exist at the time of the Roman-Dutch authorities, it is unsurprising that the crime was confined to judicial proceedings. Nonetheless, our courts have seen fit to recognize obstruction of the police within the boundaries of the common-law definition. In *S v Burger* 1975 (2) SA 601 (C) at 616 in fine Baker J explicitly reasoned that this approach did not offend the principle of legality but merely adapted the crime to modern circumstances:

‘What is of importance are the principles enumerated in the cases, not the specific instances of the offence of defeating or obstructing the course of justice. . . . The law grows and develops as time passes; it does not stand still. Since the time of the Roman-Dutch writers great developments have taken place in the field of criminal law. One of the most important of these is that we today have appointed civil servants whose duty it is to investigate alleged offences; and to see to it that they are properly tried in public. The police investigate alleged offences; the docket is submitted to the Attorney-General; he decides whether or not a prosecution should be instituted. It is as equally serious to prevent an investigation from taking place as it is to attempt to influence the investigation after it has commenced, or to attempt to influence the course of a trial in order to obtain the accused’s acquittal. All three types of conduct materially amount to the undermining of the course of justice.’

The above judgment was applied with approval by Macdonald CJ in *S v Greenstein* 1977 (3) SA 220 (RA) at 224D-F, who went on to state:

‘These processes have undergone fundamental changes since Roman times and, while the basic principles underlying the offence remain unaltered, they must necessarily be applied in very different circumstances at present. The Roman law offences related almost exclusively to the trial stage and thus it was not illogical that the condition precedent in the form of a particular state of mind on the part of the accused should also relate to this stage of the proceedings. In modern systems of law, the administration of justice, has with the development of police forces, become increasingly involved in the investigation and prevention of crime. I agree with the view expressed by CENTLIVRES, J., in *R. v. Adey and Hancock* (1), 1938 (1) P.H. H75, that:

“It would be lamentable if the Court were to lay down that, when the police were investigating a suspected crime, anybody who tried to obstruct or thwart the administration of justice by persuading people to put false information before the police was not liable to be charged with the crime of attempting to defeat the due course of justice.”

This stance has also received academic approval: ‘This would seem to be correct in principle. The detection, apprehension and charging of offenders is plainly part of the process of the administration of justice in a modern legal system’ (Burchell op cit 944).

The only difference the *constitutional* inclusion of the legality principle should be seen as introducing is the explicit recognition of a new ground on which the common-law definitions of crimes can be extended by the courts. Before the democratic Constitution, the only clear justification for courts to extend the scope of common-law crimes was the inclusion of new forms of behaviour (like dealing in credit or obstructing the police) that could be read into the existing definition. This ensures that the law remains relevant in a changing society and prevents the common-law definitions of crimes from being relegated to the annals of history. Since the advent of our supreme, justiciable Constitution there is a second ground for developing common-law crimes: to bring the common law into line with the Constitution itself, especially the rights contained in the Bill of Rights. This assertion is further supported by the existence of s 39(2) of the Constitution: ‘When interpret-

ing any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Section 39(2) of the Constitution

It has been established that Snyman does not think the principle of legality ever permits the extension of the scope of common-law crimes. How, then, does he make sense of the above injunction in s 39(2)? According to him the word 'develop' does not mean extending the scope of existing crimes. 'Develop' means the court could 'clear up existing points of doubt in the definition of crimes, . . . hold that certain conduct is not punishable in terms of existing definitions of crimes, or perhaps even . . . fill an obvious lacuna in the definition of a crime' (Snyman at 679). According to Snyman it is an accepted principle of law that the definition of the outer limits of liability should not, *without very good reason*, be extended by analogy (ibid, my emphasis). The use of analogy to the advantage of the accused by creating a new defence or limiting the scope of a crime is, Snyman asserts, permissible (ibid). To do otherwise leads to uncertainty and therefore flies in the face of the legality principle.

But surely filling a lacuna is precisely what the court did to the definition of rape in this case, though I would argue it did so incompletely. Snyman himself concedes that analogy may be used with 'very good reason'. What better reason could there be than to render the law constitutional? Furthermore, extending the scope of the crime in this circumstance was not prejudicial to the accused as it was not applied to the accused himself but was rather made available to future accused persons. Thus it does not lead to uncertainty or vagueness, as the current state of the law is clearly expressed. Certainty is further encouraged when the Constitutional Court interprets the scope of the rights contained in the Bill of Rights so that law offending these rights can be identified. In view of this, the court's unwillingness in *Masiya* to provide a detailed rights analysis is especially disappointing. This criticism is echoed by Stu Woolman in 'The amazing, vanishing Bill of Rights' (2007) 124 *SALJ* 762 at 768 (emphasis original):

'What is wrong with *Masiya*? It never *truly* considers the direct application of substantive provisions of the Bill of Rights to the challenged common-law rule regarding the definition of rape. It never engages the content of the substantive provisions of the Bill of Rights and thus never articulates constitutional rules that amplify that content.'

South Africa has undergone a transition from 'rule by law' under apartheid to 'rule of law' under constitutional supremacy (Brian Z Tamanaha *On The Rule of Law: History, Politics, Theory* (2004) 3, quoting Steven Mufson 'Chinese movement seeks rule of law to keep government in check' *Washington Post* 5 March 1995). If we are to take the adoption of constitutional supremacy seriously, constitutional law cannot be viewed in isolation, distinct from other areas of law. Constitutional principles need to

be the lens through which all law, including the principle of legality, is interpreted and understood. This statement should not be read by scaremongers as signalling the end of legal certainty. The principle of legality is robust. It has endured centuries of social and jurisprudential change and is capable of adapting to and surviving through this new constitutional era too. The core restraints of the principle can accommodate our increased understanding and protection of fundamental rights.

SEPARATION OF POWERS

In order to support his stance that the principle of legality does not permit extension of the scope of crimes, Snyman distinguishes between interpretation and innovation (Snyman at 678, and see also Hoctor *op cit* at 85). According to this line of reasoning the former is the courts' correct role while the latter breaches the principle of legality and the separation of powers — innovation is best left to the legislature.

However, it is necessary to recognize that 'while the courts have drawn a distinction between "legitimate interpretation and innovation", interpretation is not necessarily always devoid of, or distinct from, innovation' (Phelps & Kazee *op cit* at 353). In order to ensure the meaningful survival of our common-law tradition and clear up areas of disagreement, courts will need to be, and have been, innovative in their interpretations of the ambit of crimes. Thus, additional components of crimes that have not previously been recognized by courts will have to be recognized in order to ensure the law's relevance, such as locating obstruction of the police within the definition of obstructing the course of justice. In this way the common law grows, in the spirit of the Constitution, within the existing framework of crimes. If behaviour cannot legitimately fit into an existing common-law crime, and the existing definition is nonetheless constitutional as it stands, then it is up to the legislature to intervene.

This approach to the principle of legality and the development of the common law does not breach the separation of powers — it is a division of labour that is in keeping with the conception of the separation of powers in South Africa as a 'constitutional dialogue', with each arm of the state given checking functions over the others (see Sandra Liebenberg 'Socio-economic rights' in Matthew Chaskalson et al *Constitutional Law of South Africa* (1999) 41–i at 41–10, and see Phelps & Kazee *op cit* at 354). Further, the legislature is always free to intervene should it find that the court erred in its interpretation of the common-law crimes. '[T]he doctrine of the separation of powers, while suggesting good reasons why . . . lines must be drawn (judicial non-accountability, institutional competence, etc), does not of itself indicate precisely where they should be placed' (Jamie Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible?' (1989) 37 *American J of Comparative Law* 495 at 513–14, cited by Liebenberg *op cit* at 41–9–10). This collaborative and co-operative model contributes to the smooth functioning and legitimacy of the operations of the state:

‘A different conception [of the separation of powers] is needed which emphasizes the need to develop a culture of openness, responsiveness and justification in the interchange between the different branches of government’ (Liebenberg *op cit* at 41–8).

The majority judgment in *Masiya* recognized that if courts cannot bring the law in line with the Constitution then s 39(2) is rendered meaningless (para 51). The Constitution is meant to be a document of practical application that effects social change. Snyman’s interpretation of s 39(2) would give this injunction mere lip service. Development of the common law should of course be exercised with caution and deference to the other arms of state. However, in instances where the legislature is dragging its feet, as was the case with the Sexual Offences Bill, it is appropriate and desirable that the court should intervene. The words of the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 109 are instructive in this regard:

‘The principle of the separation of powers . . . recognises the functional independence of branches of government. On the other hand, the principle of checks and balances . . . anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.’

CONSTITUTIONALITY OF THE COMMON-LAW DEFINITION OF RAPE

Contrary to Snyman’s assertion, the common-law definition of rape *was* unconstitutional. In fact one of the headings in his note, ‘The constitutionality of the common-law definition of rape’ (Snyman at 682), is worded rather curiously because he does not actually proceed to consider any kind of rights analysis in reaching his conclusion that the definition of rape was constitutional. Most of this part of his discussion focuses on the physiology of male and female sex organs. Discussing the physiology of the species — even if the same physiology is present ‘through the whole of the animal and even through much of the vegetable world’ (*ibid* at 683) — is not, with respect, a constitutional analysis and does not provide a legal basis for arguing that a particular crime is constitutional. Furthermore, simply because men and women have different sex organs does not mean that they experience degradation, humiliation and violation differently or require different protection.

Continuing his focus on the male and female anatomy, Snyman points out that ‘[p]enile penetration of the vagina may result in the woman’s becoming pregnant’ (*ibid*, *emphasis original*; and see also *Criminal Law* (2008) 46: ‘[T]he main or at least one of the main reasons for criminalising rape is to protect the woman from becoming pregnant without her will’). This is a wholly irrelevant and misplaced consideration. It shifts the focus away from the rape survivor to the

unborn child. This harks back to the days when marital rape was not a crime as the focus was placed on the male's property rights in his wife: '[D]ebates about raping husbands are predicated on the notion that a woman's body is property. This property is transferred to the husband on marriage' (Joanna Bourke *Rape — A History from 1860 to the Present* (2007) 328). A woman is more than a vessel for childbirth or the property of her husband. Furthermore, focusing on the risk of pregnancy rests the rationale of the crime on a potential *consequence*. This is not consonant with the fact that rape is a *circumstance* and not a consequence crime. (See *Criminal Law* (2002) 76: 'Let us consider the example of rape: here the act consists simply of sexual penetration. The result of this act (for example, the question whether or not the woman became pregnant) is, for the purposes of determining liability for the crime, irrelevant.')

With respect to the finding of the majority to the contrary, the common-law definition of rape is unconstitutional. This is so both because it fails to meet the standard set in s 39(2) and because, to iterate the finding of Langa CJ in para 80, it

'fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity, but bodily autonomy. All these concerns apply equally to men and women. . . .'

That is sufficient justification for the court to develop the common law. This is even more pronounced considering the partial extension that the court permitted was, rightly, not applied retrospectively to Mr Masiya himself and thus did not fall foul of legality.

Snyman argues that the traditional definition of rape did not discriminate unfairly against women and therefore did not require extension (Snyman at 678; *Criminal Law* (2008) 46). I submit respectfully that his focus is mistaken: the issue is not whether it discriminates unfairly against women but whether it discriminates unfairly against men and boys. The fact that the victim in this case was female and not male should not have stopped the court from issuing a gender-neutral order. In the 'gay rights' cases that have come before the court remedies have been fashioned in a gender-neutral manner, regardless of the gender of the parties before the court (for example, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) regarding the constitutionality of the common-law crime of sodomy; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), where the court was asked to declare s 25 of the Aliens Control Act 96 of 1991 unconstitutional in that it unfairly discriminated against same-sex couples; *Gory v Kolver* NO 2007 (4) SA 97 (CC) regarding the constitutionality of s 1(1) of the Intestate Succession Act 81 of 1987; and *Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) regarding the constitutionality of the common-law definition of marriage and, to the extent that it was implicated, the constitutionality of the definition of marriage in the Marriage Act 25 of 1961. See also Phelps & Kazee *op cit* at 348).

The revised definition of rape, which excludes men from being victims of the crime, discriminates against some of the most vulnerable groups in society (such as young boys, homosexuals and prisoners) by denying them equal protection of, and recognition by, the law. The relevance of vulnerability in deciding whether discrimination is unfair was clearly described by O'Regan J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 112: 'The more vulnerable the group adversely affected by the discrimination, the more likely it will be held to be unfair.' The partial extension of the common-law definition of rape has resulted in the anomalous situation of the Constitutional Court's issuing an order that, according to the above line of reasoning, can itself be challenged for being unconstitutional (Woolman *op cit* 767n7).

THE EMOTIVE NATURE OF *MASIYA*

The emotive nature of the case is one explanation provided by Snyman for why the court, in his view, allowed itself to infringe the principle of legality and the doctrine of separation of powers. A list of quotes from the judgment is provided by him in order to substantiate his point that the court was unduly influenced by emotional considerations (Snyman at 680):

'[O]n a close reading of *Masiya* it is noticeable how many emotionally charged, and therefore vague, words and expressions are used by the judges. Examples are "the crime of rape perpetuate[s] gender stereotypes and discrimination" (para 36); "humiliating" (para 26); "patriarchal stereotypes" (para 29); "the abhorrence with which our society regards these pervasive but outrageous acts" (para 44); "degrading, humiliating and traumatic" (para 30); "gross humiliation and indignity" (para 79); "feelings of righteousness" (para 9).'

He then points out (*loc cit*) that judges should not be allowed to extend the operation of the criminal law based on ideological or emotional considerations, making reference to *S v Augustine* 1986 (3) SA 294 (C) at 302I-J to support this proposition:

'There are always people to be found who invite and favour "extensions" by the Court of the existing principles of the common law to encompass situations which they feel "should" be encompassed, even if they have not hitherto been so encompassed. I do not think the Courts should respond too readily to such invitations. Fundamental innovations of this kind are for the Legislature . . . and not the Courts.'

With respect, *Masiya* did not involve law that *should* be developed on ideological and emotional grounds. It involved law that *required* development in order to bring it into line with the Constitution. Much of the material that courts confront involving criminal issues has an emotional or tragic background. Recognizing the painful experiences of survivors and victims of crimes is not tantamount to disregarding the law. The law and human emotion and suffering are not mutually exclusive. What more palatable words would Snyman have the courts use when describing the effects of rape? Judges are not robots devoid of emotion, and simply recognizing the

emotional impact of a crime does not necessarily mean the law is being improperly applied.

The common-law definition of rape at stake in *Masiya* was unfairly discriminatory. Thus the court could and should have intervened, which it failed to do adequately by refusing to take the definition to its full, gender-neutral, conclusion. The legitimate extension of the scope of common-law crimes should be based on law, not emotion, and the supreme law of our land is the Constitution. By failing to bring the law into line with the Constitution the court failed in its duty to guard and promote the values contained in the Bill of Rights.

CONCLUSION — A DANGEROUS PRECEDENT INDEED

One point on which Snyman and the present author clearly agree is that *Masiya* sets a dangerous precedent. Snyman (at 685, and see *Criminal Law* (2008) 47) seems to see it as signalling the end of legal certainty — a free-for-all for the courts to do with the criminal law as they like. To support this he provides three examples of crimes that the court could extend by analogy applying the precedent set in *Masiya*: extending the crime of housebreaking with intent to steal to include breaking into a motor vehicle; extending the crime of arson to include setting fire to moveable property; and extending the crime of theft to include theft of incorporeal things (Snyman at 685–6).

There is a pivotal distinction between *Masiya* and the three examples he provides: none of those examples involves definitions that are unconstitutional. The common-law definition of rape was unconstitutional, and therefore the court was obliged to intervene. It has been argued in this note that the inclusion of the principle of legality in the Constitution provides a basis for such intervention, by recognizing a new ground on which the court can extend the scope of common-law crimes. If the Constitutional Court is prohibited from intervening in order to bring the law in line with the rights contained in the Bill of Rights, the concept of constitutional supremacy is robbed of substance. Furthermore, the development of the definition of rape could have been effected with the intention of the legislature in mind, as the Bill, on which the legislature had so noticeably dragged its feet, was available for the court to consult.

Two particular issues as they pertain to *Masiya* are noticeably separated in Snyman's discussion: the principle of legality and the constitutionality of the common-law definition of rape. This is a fundamental distinction between our stances, for I do not believe these issues are divisible. If in our constitutional dispensation we are to take the notion of constitutional supremacy seriously, all legal principles, even those as hallowed as legality, need to be viewed through a constitutional lens. Even under a traditional understanding of legality the courts have always had limited ability to develop the scope of common-law crimes by recognizing new behaviour that fits into the existing definition (such as theft of credit and obstruction of

the police). In *Masiya* the court had no choice but to develop the law owing to the fact that the definition as it stood *was* unconstitutional.

Masiya is a dangerous precedent because the court failed to raise its voice in the constitutional dialogue that functions in South Africa between the arms of state. There was no reason of logic or justice why rape should be gender-specific. Furthermore, in line with the minority judgment in *Masiya*, there was no rule of law that prohibited the court from executing a gender-neutral extension.